Supreme Court, U.S.
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No. 93-117

In The

Supreme Court of the United States

October Term, 1993

BRIAN K. BRISCOE,

Petitioner,

vs.

DEVALL TOWING & BOAT SERVICE OF HACKBERRY, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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Pursuant to Supreme Court Rule 15.7, petitioner, Brian K. Briscoe, files this Supplemental Brief to bring to the Court's attention the case of *Gough v. Natural Gas Pipeline Co. of America*, 996 F.2d 763 (5th Cir. 1993), decided July 20, 1993 and the opinion of the trial court in *Anselmi v. Penrod Drilling Corp.*,

No. 90-1449 (E.D. La. September 13, 1993), reproduced at A-32.[1]

This case involves determination of when a seaman may recover for purely emotional injuries. The trial court in this case ruled that a seaman may recover for emotional injuries *only* if those emotional injuries are accompanied by and related to non-trivial physical injuries. A-7. The trial court's decision was affirmed in a one-sentence unpublished opinion. A-1. Briscoe's suggestion for rehearing *en banc* was denied. A-14.

In his original petition for writ of certiorari, Briscoe cited a decision in *Anselmi v. Penrod Drilling Corp.*, 813 F. Supp. 436 (E.D. La. 1993), in which the trial court denied a motion for summary judgment. *See* Petition at 14. The *Anselmi* court found the plaintiff had stated a claim under the zone-of-danger test which had not been rejected by the Fifth Circuit. The defendant in the *Anselmi* case filed a motion for reconsideration based on the rulings in this case by the trial court and the Fifth Circuit. The motion for reconsideration was denied by the district court:

> The district court in *Briscoe* mistakenly held that *Ainsworth v. Penrod Drilling Corp.*, 972 F.2d 546 (5th Cir., 1992) rejected the application of the "zone of danger" theory. . . . *Briscoe* also ignored the comment in *Plaisance* that "*Gaston* [*v. Flowers Transp. Co.*, 866 F.2d 816 (5th Cir. 1989)] leaves open the question of whether a plaintiff may recover for purely emotional injuries under the zone of danger theory." See *Plaisance v. Texaco, Inc.*, 966 F.2d 166, 169 (5th Cir. 1992).

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1. References to the Appendix will be designated A-__. Page numbering in the appendix in this Supplemental Brief begins at A-32, continuing where number in the original petition ended.

Anselmi v. Penrod Drilling Corp., No. 90-1449 (E.D. La., Sept. 13, 1993), reproduced at A-32.

The trial court in *Anselmi* relied on the *Gough* case for the proposition that *Briscoe* was wrongly decided and that the Fifth Circuit has not yet squarely decided whether recovery may be had under the zone-of-danger theory. Indeed, the *Gough* case says:

> Beyond question, purely emotional injuries will be compensated when maritime plaintiffs satisfy the "physical injury or impact rule".

996 F.2d at 765 (citing *Plaisance*). Like Brian Briscoe in the instant case, the plaintiff in *Gough* suffered only trivial physical injuries of little compensable value. 966 F.2d at 766 (multiple contusions). The court nevertheless found that the plaintiff's exposure to heat, jumping overboard into the Gulf of Mexico, inhalation of fumes, and ingestion of salt water satisfied the *impact* test. The Fifth Circuit in *Gough* cited *Petition of United States*, 418 F.2d 264 (1st Cir. 1969) for the proposition that a "substantial jolt" which throws a seaman into the water satisfies the impact rule. 966 F.2d at 766. This is clearly contrary to the holdings of the trial court and the Fifth Circuit in this case.

Petitioner believes that the *Gough* and *Anselmi* cases were correctly decided. The decision in this case, as the trial court in *Anselmi* stated, is the result of a "mistake" made by the trial court and affirmed by the Fifth Circuit. The fact that *Briscoe* was an unpublished opinion does little more than bury the mistake and limit the harm caused by the "mistake" to depriving Brian Briscoe (but not the plaintiffs in *Gough* and *Anselmi*) of a trial on the merits.

As petitioner predicted in his original petition for writ of certiorari, *see* petition at 14-15, the standard set forth by the trial court in this case and affirmed by the Court of Appeals is a standard

which is applied only to Brian Briscoe. The plaintiff in *Gough* was awarded $100,000 for his injuries and the plaintiff in *Anselmi* is being permitted to take his case to trial. Unless this court acts, Brian Briscoe will be unjustly denied his right to a trial.

While a conflict among the circuits exists independent of the Fifth Circuit's anomalous result in *Briscoe*, justice may be served by reversing the trial court's judgment as contrary to law of the Fifth Circuit or remanding this case to the Fifth Circuit for reconsideration in light of *Gough*. In the alternative, this Court may resolve the conflict among the circuits.

Petitioner requests and urges this Court to grant his petition for writ of certiorari.

Respectfully submitted,

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APPENDIX — ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA FILED SEPTEMBER 13, 1993

MINUTE ENTRY
FELDMAN, J.
September 13, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 90-1449

SECTION "F"

MICKEY A. ANSELMI

VERSUS

PENROD DRILLING CORPORATION

Before this Court is Penrod's motion for reconsideration of the earlier denial of its motion for summary judgment. Penrod's motion for summary judgment was denied by this Court in its Order and Reasons dated February 18, 1993. Because Penrod's motion for reconsideration fails to state sufficient reasons for reversing this Court's earlier Order and Reasons, the motion is DENIED.

Penrod contends this Court should reconsider its earlier ruling in light of *Briscoe v. Devall Towing*, 799 F. Supp. 39 (W.D. La. 1992), *aff'd*, 992 F.2d 323 (5th Cir. 1993). The plaintiff in *Briscoe* was a deck hand on a pushboat that sank in Calcasieu Parish Ship

Channel. *Id.* at 40. The Captain ordered Briscoe off the boat when it was apparent it was going to sink. *Id.* Briscoe jumped overboard and swam about 100 feet to another waiting vessel. *Id.* Briscoe filed a claim for purely emotional injuries caused by "extreme anxiety attacks and nightmares regarding the sinking and his near death." *Id.* The district court granted, and the Fifth Circuit affirmed defendant's motion for summary judgment against the plaintiff on the ground that plaintiff could not recover under the Jones Act or general maritime law for purely emotional injuries. *Id.* at 43.

Penrod's reliance on *Briscoe* is misplaced. *Briscoe* is a one sentence, unpublished opinion, which is intended to have no precedential value whatsoever. The district court in *Briscoe* mistakenly held that *Ainsworth v. Penrod Drilling Corp.*, 972 F.2d 546 (5th Cir. 1992) rejected the application of the "zone of danger" theory. A close reading of *Ainsworth* reveals that the Fifth Circuit did not reject the "zone of danger" theory. Rather, *Ainsworth* held that the plaintiff did not, on the facts of that case, come within the "zone of danger" theory. *Briscoe* also ignored the comment in *Plaisance* that "*Gaston* leaves open the question of whether a plaintiff may recover for purely emotional injuries under a zone of danger theory." *See Plaisance v. Texaco, Inc.*, 966 F.2d 166, 169 (5 Cir. 1992). This observation has been very recently repeated by the Fifth Circuit in a case decided even after its approval of *Briscoe*, and confirms this Court's belief that the Fifth Circuit has not yet squarely met the question. *See Gough v. Natural Gas Pipeline Co. of America*, 996 F.2d 763, 766 (5 Cir. 1993).

As this Court stated in its Order and Reasons, the Fifth Circuit still grudgingly recognizes the doctrinal existence of a narrow exception to the physical injury requirement. In order to come within the exception, a plaintiff must establish that he was objectively within the zone of danger, that he feared at the time of

the incident that his life or person were in danger, and that his emotional injuries were a reasonably foreseeable consequence of the defendant's alleged negligence. Plaintiff's complaint states precisely these facts. Accordingly,

IT IS ORDERED:

That Plaintiff's Motion for Reconsideration of Motion for Summary Judgment is DENIED.